

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

OLD GRANITE DEVELOPMENT, LTD., - Case No. 3:06-CV-2950  
-  
Plaintiffs, - Toledo, Ohio  
- May 16, 2008  
v. - Motion Hearing  
-  
CITY OF TOLEDO, -  
-  
Defendants. -  
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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE JACK ZOUHARY  
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: Barkan & Robon  
By: Marvin A. Robon  
R. Ethan Davis  
Suite 100  
1701 Woodlands Drive  
Maumee, OH 43537  
(419) 897-6500  
  
For the Defendants: Bahret & Associates  
By: Robert J. Bahret  
Keith J. Watkins  
Suite 709  
7050 Spring Meadows, W  
Holland, OH 43528-1844  
(419) 861-7800  
  
Court Reporter: Tracy L. Spore, RMR, CRR  
1716 Spielbusch Avenue  
Toledo, Ohio 43624  
(419) 243-3607

Proceedings recorded by mechanical stenography,  
transcript produced by notereading.

12:49:47 1 (Commenced at 12:50 p.m.)

12:50:34 2 THE COURT: We're on the record in case  
12:50:37 3 06-2950, Old Granite Development v. City of Toledo.  
12:50:41 4 The Court has spent some time with counsel and some of  
12:50:44 5 the parties prior to coming on the bench. We have  
12:50:47 6 outlined several motions that are pending prior to next  
12:50:50 7 week's trial, which is what we're going to address next  
12:50:53 8 on the record.

12:50:56 9 Let's do this in a bit of reverse order. We  
12:51:00 10 have a motion filed by the Defendant, City of Toledo, to  
12:51:09 11 exclude a newly identified witness. It is number 196  
12:51:15 12 on the court docket. And the Court has reviewed that  
12:51:19 13 motion. The plaintiff apparently wishes to call one  
12:51:24 14 Stanley Brown. And that name was not disclosed until  
12:51:28 15 very recently. And the defendant claims it has not had  
12:51:32 16 an opportunity to depose Mr. Brown.

12:51:37 17 Does anyone wish to argue -- it's your  
12:51:40 18 motion, Bob. If you wish to argue it further, you may.  
12:51:43 19 If not, we'll turn it over to Marv and his team.

12:51:47 20 MR. BAHRET: I'll let them respond, and we  
12:51:50 21 may rebut.

12:51:51 22 THE COURT: Keith?

12:51:52 23 MR. WATKINS: I just wanted to make sure the  
12:51:54 24 Court got the motion in limine that we just filed  
12:51:56 25 recently on that subject.

12:51:58 1 MR. BAHRET: That's the motion he just says  
12:52:00 2 he has.

12:52:01 3 MR. WATKINS: Okay, thank you.

12:52:02 4 THE COURT: Document number 196.

12:52:06 5 MR. WATKINS: Yes.

12:52:06 6 THE COURT: Marv.

12:52:08 7 MR. ROBON: Thank you, Your Honor. Mr.  
12:52:10 8 Laskey brought me a purchase contract that was signed  
12:52:14 9 that he just found in preparation for the trial. It  
12:52:19 10 was signed by this individual with a cashier's check.  
12:52:23 11 At the time apparently the guy couldn't get financing;  
12:52:27 12 he finally got it. He came out to look at the  
12:52:29 13 subdivision, saw the big pipes lying on the railroad  
12:52:34 14 right-of-way and said, all the trees are gone. I'm not  
12:52:38 15 going to buy. It was a witness that we had no  
12:52:40 16 knowledge of before. I would also point out that the  
12:52:44 17 witness list that was provided by opposing counsel was  
12:52:48 18 received yesterday, so we're --

12:52:52 19 THE COURT: But are there any witnesses on  
12:52:54 20 their list that you have not had an opportunity to  
12:52:57 21 depose or were not previously disclosed to you?

12:53:00 22 MR. ROBON: There are two or three of them,  
12:53:03 23 but I'm willing to take my chances, Judge. I don't  
12:53:06 24 think's anybody with a smoking gun there that I'm  
12:53:09 25 concerned about.

12:53:11 1 MR. BAHRET: We also disclosed the witnesses  
12:53:20 2 informally by way of letters previously on more than one  
12:53:24 3 occasion. All we did more recently is put it in  
12:53:27 4 official form and filed it. No name is on that list  
12:53:29 5 that we filed he didn't already know from informal  
12:53:33 6 disclosures.

12:53:36 7 THE COURT: Timeframe of Mr. Brown's  
12:53:38 8 purchase contract and the timeframe of the incident in  
12:53:42 9 this case?

12:53:45 10 MR. BAHRET: We have not seen the purchase  
12:53:46 11 contract, Your Honor, even as I sit here, but we are  
12:53:49 12 told that it was somewhere in 2004 he allegedly provided  
12:53:54 13 a purchase contract, and then two and a half years or  
12:53:57 14 more later he suddenly supposedly came up with money and  
12:54:00 15 magically shows up at the subdivision. Had we known  
12:54:04 16 that information earlier, we would have deposed him and  
12:54:08 17 also challenged his new-found finances to see if it  
12:54:12 18 really was true. We had previously in discovery asked  
12:54:16 19 for all purchase contracts, all documents with reference  
12:54:19 20 to any sales, even pending sales. That was not  
12:54:22 21 produced.

12:54:24 22 THE COURT: There appears to be no dispute  
12:54:25 23 that this is the type of information that should have  
12:54:27 24 been forthcoming during discovery. The Court  
12:54:30 25 understands that sometimes information is found at a

12:54:33 1 late date, which appears to be the case here. However,  
12:54:38 2 this is Friday, and our trial does start on Monday, and  
12:54:41 3 it appears to me that this is quite late in the game.  
12:54:45 4 And that because it is so late in the game, it is  
12:54:50 5 appropriate to exclude Mr. Brown's testimony.

12:54:52 6 The Court would add that it does not appear  
12:54:55 7 his testimony is critical to the proof in plaintiff's  
12:54:59 8 case. At best it may be something that's additional to  
12:55:03 9 other evidence the plaintiff has at its ready. And  
12:55:09 10 therefore, the Court will grant the defendant's motion  
12:55:11 11 and preclude Mr. Brown from testifying in this case.

12:55:18 12 Next on my list --

12:55:21 13 MR. ROBON: Your Honor, can I make a point?

12:55:25 14 THE COURT: Sure.

12:55:26 15 MR. ROBON: In some cases I would have to  
12:55:28 16 bring that witness in and proffer him. Can I just  
12:55:30 17 proffer his testimony now so I don't have to bring him  
12:55:33 18 in and have him excluded?

12:55:35 19 THE COURT: Sure, you may proffer it now.  
12:55:37 20 The Court would note, however, that the proffer is being  
12:55:39 21 made without the production of any documents for either  
12:55:43 22 Court or counsel.

12:55:44 23 MR. ROBON: I thought we had sent the  
12:55:46 24 contract with the letter, the e-mail. I apologize for  
12:55:49 25 that. It's a simple one-page purchase contract.

12:55:52 1 THE COURT: Go ahead and do it right now  
12:55:54 2 since we're on the topic, if you wish. I just want the  
12:55:57 3 record to reflect no document has been provided to the  
12:55:59 4 Court, and it apparently has not been provided to  
12:56:02 5 opposing counsel. As counsel indicates, there is no  
12:56:05 6 opportunity to depose this witness nor opportunity to do  
12:56:08 7 appropriate follow-up with any testimony that he might  
12:56:12 8 give.

12:56:13 9 MR. ROBON: Thank you, Your Honor. The  
12:56:15 10 witness would simply testify that he was ready to  
12:56:18 11 purchase; he had the money. He came out to the  
12:56:21 12 subdivision, saw the big concrete pipe that was going to  
12:56:26 13 be installed on the railroad right-of-way, and saw trees  
12:56:29 14 were cut down, and decided he didn't want to buy any  
12:56:32 15 longer.

12:56:36 16 THE COURT: Next on my list is the  
12:56:45 17 defendant's motion to preclude reference to wetlands.  
12:56:51 18 It's document number 157 on the Court docket. And  
12:56:59 19 again, since have a brief from defendant but have not  
12:57:03 20 heard from plaintiff, although probably it may make some  
12:57:07 21 sense to talk about plaintiff's motion for  
12:57:09 22 reconsideration of treble damages at the same time  
12:57:13 23 because part of that is based on a wetlands issue, as I  
12:57:17 24 understand it. And maybe the two can be argued  
12:57:22 25 together. You tell me if you think I'm wrong on that.

12:57:24 1 MR. WATKINS: That's fine with me, if the  
12:57:27 2 Court prefers to have them argued together.

12:57:29 3 THE COURT: There's some overlap there, so  
12:57:31 4 that's why I'm suggesting it. I'll note that  
12:57:34 5 plaintiff's motion for reconsideration is document  
12:57:36 6 number 163 on our docket and that there is an opposition  
12:57:42 7 by the City which is document number 195.

12:57:46 8 Keith.

12:57:47 9 MR. WATKINS: Thank you. On the wetlands  
12:57:49 10 issue, the motion that we filed initially was back in  
12:57:55 11 April, and that's a matter of record. In response  
12:57:58 12 there was the question of Mr. Kusnier's deposition. In  
12:58:03 13 the document filed on behalf of plaintiffs entitled  
12:58:10 14 Plaintiff's Memorandum in Response to the Motion for  
12:58:13 15 Protective Order related to John Kusnier and the  
12:58:17 16 wetlands issue, the plaintiffs state, "We believe Mr.  
12:58:19 17 Kusnier is going to opine the following: That a  
12:58:22 18 permit" --

12:58:23 19 THE COURT: I'm going to stop you. In the  
12:58:25 20 interest of time, I have the brief you're referring to;  
12:58:28 21 I earlier referenced it. It's 163. I've read the  
12:58:32 22 brief. So don't read from the brief, please, but add  
12:58:35 23 to the argument if you wish.

12:58:37 24 MR. WATKINS: I just wanted to point out as  
12:58:39 25 a preface those things on page 3 of the brief. But

12:58:42 1 also Mr. Kusnier's deposition, which I understand has  
12:58:46 2 been filed with the Court, contradicts what they are  
12:58:48 3 saying.

12:58:49 4 THE COURT: When was his deposition filed?  
12:58:51 5 Anybody know?

12:58:52 6 MR. ROBON: It was filed a week ago  
12:58:54 7 Thursday.

12:58:55 8 THE COURT: Thank you.

12:58:59 9 I guess before you go on, I'm sorry to  
12:59:01 10 interrupt you, Keith. I want to cut to the chase.  
12:59:04 11 Keith is indicating that you did not get from Mr.  
12:59:09 12 Kusnier the two opinions that you set forth on page 3.  
12:59:15 13 Is Keith right or wrong?

12:59:19 14 MR. ROBON: I'm sorry. We didn't get the  
12:59:22 15 opinions --

12:59:23 16 THE COURT: Yes. He said that -- I'm  
12:59:25 17 sorry. The brief that you filed indicated on page 3  
12:59:34 18 that Mr. Kusnier would opine that a permit would have  
12:59:43 19 had to have been issued to cut wetland trees in 2006.  
12:59:46 20 Is that what he said?

12:59:47 21 MR. ROBON: He opined that the permit that  
12:59:50 22 was actually issued by the Ohio EPA did not provide for  
12:59:54 23 filling of one of the ditches, and he also opined that  
12:59:59 24 he found 47 potential wetland areas in the right-of-way,  
13:00:05 25 one of which was as close as Hospice.



13:00:08 1 THE COURT: I'm sorry to interrupt you, but  
13:00:10 2 I'm an equal opportunity interrupter.

13:00:13 3 Do you have page 3 of your brief in front of  
13:00:15 4 you?

13:00:16 5 MR. ROBON: I don't have it in front of me.

13:00:24 6 THE COURT: Look at page 3 of the brief I'm  
13:00:26 7 about to hand you. It is your brief. And you  
13:00:28 8 indicated on page 3 that he would opine to point A and  
13:00:32 9 point B. And without reading them into the record, tell  
13:00:35 10 me whether he did or did not opine on those two points.  
13:00:38 11 That's my question.

13:00:43 12 MR. ROBON: No. They objected to my asking  
13:00:44 13 him that, and he said he did not do a wetlands study  
13:00:48 14 because the City didn't engage him to do a phase 2,  
13:00:52 15 which he would have had to have done in order to opine  
13:00:54 16 on this.

13:00:56 17 THE COURT: So he did not opine on those two  
13:00:59 18 points?

13:00:59 19 MR. ROBON: Well, he --

13:01:00 20 THE COURT: You have reasons for why he  
13:01:02 21 didn't, but he didn't?

13:01:04 22 MR. ROBON: He did not.

13:01:04 23 THE COURT: Thank you. I just wanted to  
13:01:06 24 get that clear.

13:01:07 25 Keith, we're back to you.

13:01:08 1 MR. WATKINS: I just wanted to clarify, Your  
13:01:10 2 Honor, for the record, Mr. Kusnier -- and what I have is  
13:01:15 3 an index. The actual deposition, as I understand it,  
13:01:18 4 has been filed with the Court. But on page 50 he  
13:01:21 5 testifies he feels comfortable that there are no  
13:01:24 6 wetlands in that area on the Cambridge subdivision.  
13:01:29 7 That would be page 50, lines 15 through 20.

13:01:32 8 On page 55 he testified no areas of  
13:01:36 9 potential concern were found near or adjacent to Old  
13:01:40 10 Granite pertaining to wetlands.

13:01:42 11 And then the final references I wanted to  
13:01:44 12 make were on pages -- page 39, he testified: Does not  
13:01:51 13 require any separation or distances between wetland  
13:01:54 14 boundaries and upland areas, nor is there a requirement  
13:01:58 15 for buffers; the Army Corps of Engineers has no such  
13:02:02 16 requirements. He considers himself an expert in the  
13:02:05 17 area of wetlands. And finally, he testified that the  
13:02:09 18 Ohio EPA or Corps of Engineers may be concerned or may  
13:02:13 19 have things they want to do about filling of a ditch in  
13:02:16 20 a wetland area, but there is no regulatory action they  
13:02:20 21 can take because of it. That's what I wanted to  
13:02:24 22 address on the wetlands issue in addition to what we've  
13:02:27 23 already presented before the Court.

13:02:30 24 On the motion to reconsider the issue, if I  
13:02:37 25 can find my notes here --

13:02:39 1 THE COURT: Before you go on to that, let's  
13:02:41 2 give them a chance to comment on the wetlands issue. I  
13:02:51 3 should note for the record the plaintiff's brief  
13:02:53 4 indicates on page 5 that no claim is being asserted on a  
13:02:56 5 wetlands issue. However, the plaintiff is trying to  
13:02:59 6 use that evidence to show negligence or recklessness in  
13:03:05 7 this case.

13:03:06 8 MR. ROBON: Your Honor, I would like to  
13:03:07 9 point out that Mr. Kusnier testified and his report was  
13:03:13 10 admitted into the record that there were 47 potential  
13:03:16 11 wetland areas that he determined for the City of Toledo.  
13:03:21 12 This was done back in 1998. Between 1998 and 2006, the  
13:03:27 13 City did not, did not engage his firm or any other firm  
13:03:33 14 to do a phase 2 study to see if those 47 potential  
13:03:38 15 wetland areas, in fact, were wetland areas. And he  
13:03:41 16 also testified that the trees that were found in the  
13:03:44 17 railroad ditches contained wetland-type trees, and he  
13:03:48 18 described the particular kinds of trees.

13:03:51 19 The reason that we point this out to the  
13:03:53 20 Court is the reckless nature of the City's attitude,  
13:03:58 21 just like they cut the 24-inch storm main. They didn't  
13:04:02 22 go the additional step that they should have done, that  
13:04:05 23 any engineer dealing with environmental problems or  
13:04:11 24 potential environmental situations would have done.  
13:04:15 25 They didn't follow the advice of their own expert.

13:04:18 1 They did no advance studies.

13:04:20 2 THE COURT: The question I have is, of those  
13:04:23 3 40-some potential sites, was the site that's involved in  
13:04:27 4 this case identified as one of those sites?

13:04:29 5 MR. ROBON: The Hospice site, which is one  
13:04:33 6 property away, was identified.

13:04:36 7 MR. BAHRET: Two properties away.

13:04:38 8 THE COURT: The property involved in this  
13:04:39 9 case was not identified?

13:04:40 10 MR. BAHRET: He clearly testified, Your  
13:04:42 11 Honor, that there are no potential wetlands, much less  
13:04:46 12 an identified wetland on the Cambridge subdivision or  
13:04:50 13 even contiguous with it. He also testified that the  
13:04:53 14 City, since it's a governmental entity putting in a  
13:04:56 15 utility line, would not need to apply for permits to cut  
13:04:59 16 every tree right through the middle of wetlands as long  
13:05:02 17 as they're putting in a utility. So it's a red herring  
13:05:05 18 that he's talking about anyway. On top of that, he  
13:05:07 19 doesn't have a private right of action to complain about  
13:05:10 20 doing anything in wetlands that aren't his.

13:05:12 21 THE COURT: I understand and agree with your  
13:05:14 22 last point, and I think he has in effect in his brief  
13:05:17 23 conceded that point by indicating he's not offering it  
13:05:21 24 for the purposes of a direct claim. He wants to use it  
13:05:26 25 to show negligence in the City's efforts or lack of

13:05:35 1 efforts at this property.

13:05:47 2 I am persuaded that the wetlands reference  
13:05:54 3 is inappropriate in this case; and therefore, I'm going  
13:05:57 4 to grant the City's motion in limine precluding the  
13:06:03 5 reference to wetlands. I don't see that it impacts the  
13:06:09 6 issues before the Court. Counsel has indicated that  
13:06:13 7 wetlands were not identified with respect to this  
13:06:16 8 property. I am going to review the deposition  
13:06:20 9 transcript. I'm assuming that defense counsel's  
13:06:23 10 representations and pages that were referenced in the  
13:06:26 11 oral argument today will support what they said. And  
13:06:30 12 to the extent they do, that will be my ruling. If I  
13:06:33 13 find otherwise, then I reserve the right to change my  
13:06:36 14 ruling. I don't, again, view that wetlands is relevant  
13:06:43 15 to the issues here, and I'm further convinced of that  
13:06:46 16 because we don't have a wetlands expert, and if the  
13:06:50 17 testimony is wetland type and that sort of thing, that  
13:06:55 18 allows for some speculation, and I believe gets us far  
13:06:59 19 afield. And it's my recollection when we had our last  
13:07:03 20 hearing that the wetlands have sort of crept into this  
13:07:06 21 case late in the game. And I'd be willing, frankly, to  
13:07:10 22 consider it if it had some direct relevance. But I'm  
13:07:13 23 not seeing it as I sit here today. So I will grant the  
13:07:17 24 motion and will exclude testimony using the phrase  
13:07:25 25 "wetlands."

13:07:28 1 We are still with plaintiff's motion for  
13:07:33 2 reconsideration of treble damages. Having just given  
13:07:35 3 my ruling on wetlands, that may also dictate the result  
13:07:39 4 in plaintiff's motion for reconsideration of treble  
13:07:43 5 damages as I read the brief, but I am happy to listen to  
13:07:46 6 any additional argument you may have. I note, for  
13:07:50 7 example, there is no Ohio EPA official; there is no  
13:07:55 8 federal official coming in to discuss wetlands and what  
13:07:59 9 role that played here and what the City may have done or  
13:08:01 10 not done with respect to those issues. And I believe  
13:08:05 11 that I'm inclined to deny the motion for reconsideration  
13:08:10 12 of treble damages and leave on the table those three  
13:08:12 13 issues I identified at my last hearing -- I'm sorry, in  
13:08:16 14 my last opinion, which indicated that the trial of this  
13:08:21 15 case, and I'm now referring to document number 153 on  
13:08:30 16 the Court document, that the claims remaining in this  
13:08:35 17 case for trial -- this is my April 10th order -- against  
13:08:41 18 the City are negligence, trespass, and unconstitutional  
13:08:45 19 taking. And those are the three issues that are set  
13:08:51 20 for trial next week.

13:08:57 21 Hearing nothing further from plaintiff, that  
13:08:59 22 takes me --

13:09:00 23 MR. ROBON: Your Honor, could I make a  
13:09:01 24 proffer on that too?

13:09:03 25 THE COURT: Absolutely.

13:09:04 1 MR. ROBON: So I don't have to bring Mr.  
13:09:06 2 Kusnier in and waste the jury's time.

13:09:08 3 THE COURT: We also have his -- as I  
13:09:09 4 understand it, his deposition is filed. So in  
13:09:12 5 addition, that's additional. Feel free to proffer at  
13:09:15 6 this time.

13:09:15 7 MR. ROBON: We would proffer his deposition  
13:09:18 8 testimony, but in addition to that, the purpose of using  
13:09:21 9 the testimony of Mr. Kusnier to identify 47 wetland  
13:09:28 10 areas and the City's reckless attitude in just  
13:09:32 11 disregarding their own expert's recommendation for phase  
13:09:35 12 2, I believe shows a pattern of conduct that the City  
13:09:42 13 damned the will of everybody, we're going to do what we  
13:09:47 14 want to do. And Mr. Bahret is correct that Mr. Kusnier  
13:09:50 15 did identify the National -- I think it was -- Safety  
13:09:53 16 Pipeline Act where they can go through wetlands, but  
13:09:58 17 what Mr. Bahret didn't say is that Mr. Kusnier indicated  
13:10:02 18 that the statute requires them to only take the  
13:10:07 19 necessary width for digging a trench. They can't take  
13:10:11 20 a wider area. And in this particular case they took 70  
13:10:15 21 or 80 feet when they put in the water main, which I want  
13:10:21 22 to point out to the Court.

13:10:22 23 MR. BAHRET: Your Honor, first of all,  
13:10:24 24 that's -- although he said it's in the form of a  
13:10:28 25 proffer, it's more of an argument, not a proffer of

13:10:31 1 evidence. Mr. Robon is 180 degrees out of phase as far  
13:10:36 2 as what that national permit is all about.

13:10:38 3 THE COURT: Phase 1 or phase 2?

13:10:45 4 MR. BAHRET: I was slow to pick up on that.  
13:10:48 5 The permit that would allow a governmental entity to  
13:10:51 6 strip the land doesn't just say you can -- only as wide  
13:10:56 7 as the ditch. It says whatever width you need to  
13:10:58 8 accomplish the project. If that's 100 feet, it's 100  
13:11:02 9 feet; if it's 80, it's 80. It's more than just the  
13:11:05 10 ditch.

13:11:06 11 Secondly, Mr. Kusnier identified in his  
13:11:11 12 deposition, just so Marv sticks to the actual evidence  
13:11:15 13 in his claim to proffer, said that there were no  
13:11:17 14 wetlands identified. They identified 47 in the span of  
13:11:22 15 a 20-mile pipe, or whatever it is -- pipeline project.  
13:11:26 16 They identified 47 potential areas that if you're going  
13:11:30 17 to interfere with them, you might want to take another  
13:11:32 18 look. There is no testimony from any source that the  
13:11:36 19 City didn't simply reroute and not go in those areas.  
13:11:42 20 It's -- he's simply making that up.

13:11:46 21 THE COURT: Your point is the fact that the  
13:11:47 22 City didn't do a phase 2 is not evidence of  
13:11:51 23 recklessness, but rather a decision on the part of the  
13:11:53 24 City to avoid going to those areas and thereby avoiding  
13:11:58 25 the need for a phase 2?



13:11:59 1 MR. BAHRET: Exactly. And they did do a  
13:12:01 2 phase 2 on environmental issues, and they did reroute  
13:12:04 3 part of the project for that, but not an area that's  
13:12:07 4 relevant to our discussion near Cambridge.

13:12:11 5 MR. ROBON: Your Honor, I point out that the  
13:12:13 6 47 potential wetland areas were within the railroad  
13:12:16 7 right-of-way or adjacent to the right-of-way they were  
13:12:20 8 looking at.

13:12:23 9 And the other thing that he -- I don't  
13:12:26 10 believe the City of Toledo ever obtained a permit. When  
13:12:31 11 he's talking about the National Pipeline Act, I don't  
13:12:34 12 believe that permit was ever acquired by the City of  
13:12:37 13 Toledo.

13:12:38 14 MR. BAHRET: The Act says you don't need to  
13:12:40 15 get a permit.

13:12:41 16 THE COURT: There's a dispute here about  
13:12:42 17 whether the permit was needed. I'm gathering that.  
13:12:45 18 And I take it we have no one from the National Pipeline  
13:12:48 19 to come in to say whether it was or not. We have  
13:12:50 20 varying opinions of people on both sides.

13:12:55 21 MR. BAHRET: In fact, the EPA financed this  
13:12:57 22 job and flyspecked it, and we have a permit from the  
13:13:00 23 EPA, and he has a copy of it.

13:13:03 24 THE COURT: If there's nothing further,  
13:13:05 25 we'll move on and talk next about the Defendant's

13:13:10 1 motion, document number 199 on our docket. Defendant's  
13:13:30 2 motion in limine regarding plaintiff's taking claims.  
13:13:35 3 And the Defendant here seeks to preclude reference to  
13:13:39 4 takings. The Court would note at the outset that that  
13:13:46 5 is one of three claims set forth in the plaintiff's  
13:13:48 6 complaint. And I'm happy to hear from you, Keith.

13:13:55 7 MR. WATKINS: Thank you, Your Honor. The  
13:14:00 8 reason for filing the motion was to demonstrate from at  
13:14:05 9 least our side the contrast that has existed between  
13:14:11 10 what the Courts have considered to be valid taking  
13:14:14 11 claims and this case. It's an issue that varies from  
13:14:20 12 case to case in terms of what law applies. And the  
13:14:23 13 examples we have given, which we argue justify the  
13:14:27 14 motion --

13:14:28 15 THE COURT: Isn't this more appropriately a  
13:14:31 16 motion for summary judgment or, at this stage of the  
13:14:34 17 game, a motion for directed verdict?

13:14:36 18 MR. WATKINS: To the extent -- I'm not sure  
13:14:38 19 to what extent plaintiffs agree with us in terms of what  
13:14:42 20 the facts are here.

13:14:43 21 THE COURT: Well, let's find out. Maybe  
13:14:45 22 Marv, since he has not had an opportunity, in fairness,  
13:14:49 23 to file something in response, maybe he will concede  
13:14:51 24 this is not a takings case, but then again maybe Ethan  
13:14:55 25 will disagree.

13:14:56 1 MR. DAVIS: I'll disagree, Your Honor. It  
13:14:58 2 is a takings case.

13:14:59 3 THE COURT: Can I have you pull the mike.

13:15:01 4 MR. DAVIS: All that's needed for a taking  
13:15:03 5 claim is substantial and unreasonable interference with  
13:15:06 6 an individual's property rights by the government, and  
13:15:09 7 that's clearly what happened here.

13:15:10 8 THE COURT: Isn't the taking here limited to  
13:15:12 9 the water issue?

13:15:13 10 MR. DAVIS: No, Your Honor. There is an  
13:15:15 11 element -- there is approximately nine trees that were  
13:15:18 12 cut and taken from Old Granite's property by the City of  
13:15:22 13 Toledo's agents in this case.

13:15:23 14 THE COURT: Those nine trees would  
13:15:25 15 constitute a taking? What's your best case on this?

13:15:28 16 MR. DAVIS: They came in and took part of  
13:15:30 17 our property. It's actually some of the stuff cited by  
13:15:33 18 the defendant in their jury instructions, as a matter of  
13:15:36 19 fact.

13:15:38 20 THE COURT: Since I don't have a joint set  
13:15:39 21 of jury instructions, I haven't had an opportunity to  
13:15:42 22 review that.

13:15:43 23 MR. DAVIS: Yesterday evening they filed a  
13:15:45 24 supplemental jury instruction citing several cases on  
13:15:48 25 it. And they outline what actions can result in a

13:15:53 1 take. And one is when there's been a physical invasion  
13:15:57 2 of the property by the City of Toledo. Well, that  
13:16:00 3 certainly happened by the City's agents in this case.  
13:16:02 4 They came on our property; they cut down our trees.  
13:16:06 5 That's a take.

13:16:07 6 They also cite -- the City of Toledo  
13:16:11 7 destroyed or adversely affected the real property  
13:16:14 8 interest. We've got ponding water. We've got trees  
13:16:16 9 that they took and destroyed or converted to their own  
13:16:19 10 use. It's a take.

13:16:22 11 THE COURT: Again, this is sounding more  
13:16:24 12 like a motion for summary judgment or motion for  
13:16:26 13 directed verdict. So we'll entertain your arguments at  
13:16:30 14 the conclusion of the appropriate evidence in the case.  
13:16:33 15 I'm going to deny the City's motion in limine on this  
13:16:38 16 point.

13:16:39 17 MR. WATKINS: Can I simply add for the  
13:16:40 18 record --

13:16:41 19 THE COURT: Sure you may.

13:16:42 20 MR. WATKINS: The argument that we have made  
13:16:45 21 and presented authorities today to counsel and the Court  
13:16:50 22 regarding -- and I say this because of the argument that  
13:16:53 23 was just made that the City did this, the City did that.  
13:16:56 24 Well, the City didn't do that; the City's agents and  
13:16:59 25 employees did. Our position is under several cases

13:17:03 1 we've cited from the Supreme Court, as well as the Sixth  
13:17:07 2 Circuit, that there is no vicarious liability or  
13:17:10 3 respondeat superior liability of the City of Toledo for  
13:17:16 4 the conduct of its agents or employees under the law for  
13:17:19 5 such a 1983 claim, constitutional claims, or any claims.  
13:17:25 6 That's the law that we've seen. And in this particular  
13:17:27 7 case they didn't name any City of Toledo employees.

13:17:30 8 THE COURT: That's a finer legal point that  
13:17:32 9 you're now addressing, and the record should reflect  
13:17:35 10 that Keith provided the Court and opposing counsel with  
13:17:39 11 some cases on that. We will look at that over the  
13:17:45 12 weekend. And if we believe there is a legal basis for  
13:17:47 13 excluding this claim, we'll have some more discussion  
13:17:50 14 before we start trial because I think it would be  
13:17:53 15 inappropriate to have you go through the hoops of  
13:17:56 16 presenting evidence of a taking when, in fact, the  
13:17:59 17 result is going to be, based on the law that you have,  
13:18:02 18 not a case for taking because certain parties have not  
13:18:05 19 been identified. So we will look at that.

13:18:08 20 And on that narrow ground I'll reserve the  
13:18:14 21 right to supplement my ruling, which is to deny the  
13:18:18 22 motion in limine.

13:18:18 23 MR. WATKINS: Just so I'm clear, did the  
13:18:20 24 Court want me to present a written motion on that issue?

13:18:23 25 THE COURT: Not unless you think there's

13:18:25 1 something more you need to say other than what you've  
13:18:27 2 done today and other than what's in the cases you  
13:18:29 3 provided us.

13:18:30 4 MR. WATKINS: There is not.

13:18:32 5 MR. DAVIS: Your Honor, we would like to see  
13:18:33 6 a written motion. And the reason being is we've  
13:18:36 7 cursory reviewed the stuff that they've given us. We  
13:18:40 8 find the case law to be completely inapposite. They're  
13:18:44 9 talking police brutality claims and punitive damages,  
13:18:48 10 neither of which are an issue in this case. I think  
13:18:50 11 counsel's confusing a traditional 1983 governmental  
13:18:56 12 abuse case by the police with a takings-type property  
13:19:02 13 claim in this case. So we would at least like to see  
13:19:05 14 their argument articulated so we know what we're  
13:19:08 15 responding to.

13:19:08 16 THE COURT: You're about to hear it.

13:19:10 17 MR. WATKINS: So I can be clear, unlike the  
13:19:12 18 takings scenario, which we have said depends on the  
13:19:17 19 facts of this case, the cases I've cited on respondeat  
13:19:22 20 superior vicarious liability issues are clear as a  
13:19:25 21 matter of law that when you have cases under Section  
13:19:30 22 1983 generally from authoritative sources, there is no  
13:19:35 23 such vicarious or respondeat superior liability for a  
13:19:39 24 City. It's true that I didn't find a case exactly  
13:19:42 25 dealing with agents having something to do with wetlands

13:19:44 1 here, but that is the law as stated in -- which applies  
13:19:50 2 here. The fact that he wants to rely on differences in  
13:19:53 3 kind of the facts don't matter. They didn't name  
13:19:56 4 employees that they think are responsible and who could  
13:20:00 5 have, in their own scenario, been entitled to some sort  
13:20:04 6 of protective immunity, or maybe not.

13:20:07 7 THE COURT: So your point, in a sentence, as  
13:20:08 8 I understand it, Keith, is for the Section 1983 or  
13:20:12 9 takings claim, the failure to identify individuals is  
13:20:16 10 fatal to that claim?

13:20:19 11 MR. WATKINS: Yes.

13:20:21 12 THE COURT: You now have heard the argument.  
13:20:22 13 I now have given you an opportunity. I don't think I  
13:20:25 14 need a brief. But if you have some cases, I'll give  
13:20:28 15 you the same opportunity to deliver or e-mail or fax  
13:20:32 16 cases that you think represent the opposite viewpoint or  
13:20:36 17 a differing viewpoint that is more applicable.

13:20:41 18 MR. DAVIS: We will do so, Your Honor.  
13:20:42 19 Thank you.

13:20:45 20 THE COURT: We now come to the last motion,  
13:20:48 21 which is plaintiff's motion in limine precluding  
13:20:51 22 defendant's reference to spoliation of evidence. It's  
13:20:55 23 document number 185 on our docket. And we have a brief  
13:21:01 24 by the City opposing that. It's document number 194.

13:21:10 25 As I understand it, spoliation of evidence

13:21:13 1 is a cause of action that can be pursued. The City has  
13:21:17 2 raised it as an affirmative defense in this case, which  
13:21:20 3 is a bit different. And I want you to help me out on  
13:21:25 4 how I treat that. But, Ethan, it's your motion; you  
13:21:30 5 should go first.

13:21:31 6 MR. DAVIS: I'll defer to them. Your Honor  
13:21:34 7 is obviously on top of the issues.

13:21:37 8 THE COURT: I understand it as a cause of  
13:21:39 9 action, and parties should not intentionally destroy  
13:21:42 10 evidence for trial, and if you do, you can be subject to  
13:21:45 11 sanctions and damages. As an affirmative defense, I'm  
13:21:49 12 struggling a bit on how that fits.

13:21:51 13 Let me indicate to you what I'm further  
13:21:53 14 thinking. I think the underlying facts of your  
13:21:58 15 spoliation argument are probably relevant in the sense  
13:22:01 16 that the scene has changed from the time that the City  
13:22:06 17 went out there and did what they did. Therefore, there  
13:22:09 18 may need to be some explanation to the jury why someone  
13:22:12 19 can't go out and find the exact line or point to  
13:22:16 20 something that's no longer there because there's been a  
13:22:19 21 change to the topography, some additional dirt has been  
13:22:23 22 placed there by whomever. But I'm not sure the phrase  
13:22:27 23 "spoliation of evidence" is relevant to this case.

13:22:32 24 MR. WATKINS: My understanding is that it is  
13:22:38 25 something that we have to bring up as a defense, which



13:22:42 1 we have done in the case. Their motion, as I  
13:22:45 2 understand it -- and it is different than a cause of  
13:22:47 3 action. We're not here filing a lawsuit against them to  
13:22:51 4 seek money for that. But the law that is referenced is,  
13:22:59 5 my understanding, it is a defense in the case. How can  
13:23:02 6 they claim that this is the situation, then hide it? I  
13:23:09 7 am asking for a jury instruction in this case, only  
13:23:12 8 depending on how the evidence comes out. If the  
13:23:14 9 evidence doesn't warrant it, then it's not an issue.  
13:23:17 10 But striking it now on a motion in limine, we would  
13:23:19 11 oppose now.

13:23:20 12 THE COURT: What am I striking? They're  
13:23:23 13 asking -- what are you asking, that there be no use of  
13:23:26 14 the phrase "spoliation of evidence?"

13:23:28 15 MR. DAVIS: That's right, Your Honor. We  
13:23:30 16 don't think it's appropriate to have a jury instruction  
13:23:32 17 in that regard either. There's insufficient evidence  
13:23:35 18 in the record to show this was an intentional act by Mr.  
13:23:40 19 McCarthy to prejudice the City of Toledo from depending  
13:23:43 20 on an argument --

13:23:44 21 THE COURT: Stop right there. Do you agree  
13:23:46 22 with that?

13:23:46 23 MR. WATKINS: No.

13:23:47 24 THE COURT: Do you think he went out there  
13:23:48 25 because he knew there was a lawsuit that was going to

13:23:50 1 follow, and he wanted to cover up the evidence?

13:23:52 2 MR. WATKINS: I think after his examination  
13:23:54 3 at trial a jury could reach that conclusion, whether  
13:23:58 4 based on his testimony or an inference or their ability  
13:24:00 5 to evaluate the truth and accuracy of his testimony.

13:24:04 6 MR. BAHRET: Your Honor, whether his intent  
13:24:06 7 was to hide evidence or not, there can be no question  
13:24:09 8 that what he did was intentional. I don't think you  
13:24:12 9 have to have a malicious motive. It just means you  
13:24:15 10 intended to do something. The evidence is gone.

13:24:18 11 THE COURT: Well, for spoliation of evidence  
13:24:20 12 there are several hoops you have to go through, and that  
13:24:23 13 alone is not enough to prove a claim for spoliation of  
13:24:25 14 evidence. Have you got any case that says you can use  
13:24:28 15 this as an affirmative defense?

13:24:30 16 MR. BAHRET: Your Honor, I'm unclear of what  
13:24:31 17 they're even asking us to keep out of evidence.

13:24:34 18 THE COURT: I heard the phrase "spoliation  
13:24:36 19 of evidence" at this point. It's a motion in limine.  
13:24:38 20 And any argument in front of the jury on that point, to  
13:24:42 21 the extent it's a legal argument, we can have that  
13:24:44 22 outside the presence of the jury.

13:24:46 23 MR. BAHRET: Certainly. Help me, Ethan, if  
13:24:49 24 you would. You're not asking for us to fail to mention  
13:24:53 25 that the scene has changed?

13:24:55 1 MR. DAVIS: No, not at all. And I think the  
13:24:57 2 facts come in, obviously, that this dirt came in, and  
13:25:00 3 the testimony will be that they were on the eve of an  
13:25:03 4 auction, and they were trying to mitigate the harm as  
13:25:06 5 best they could. It was kind of a panic situation for  
13:25:09 6 them. And they ultimately didn't have the auction.  
13:25:12 7 But at the end of the day, there's no evidence that  
13:25:14 8 there was an intent to change this scene to prejudice  
13:25:17 9 the City or anything else.

13:25:19 10 And, Your Honor, if it comes to this, this  
13:25:20 11 will be one of the most interesting spoliation cases  
13:25:24 12 because it's all photographed, them dumping the dirt.  
13:25:27 13 I've never seen a party's spoliation of evidence and  
13:25:31 14 take pictures of it all along the way.

13:25:34 15 MR. BAHRET: The problem is your guy wasn't  
13:25:36 16 the one who took the pictures; it was Ric-man. Ric-man  
13:25:40 17 took them because you were changing the scene.

13:25:43 18 THE COURT: Well, I don't hear much dispute.  
13:25:46 19 Nobody is going to be arguing spoliation in front of the  
13:25:49 20 jury. The City, at best, is using it as a defense that  
13:25:52 21 it will use in making an argument, as I understand it,  
13:25:56 22 at some point along the way. And so I am going to  
13:26:00 23 grant in part and deny in part the motion. Any  
13:26:04 24 discussion of spoliation ought to take place outside the  
13:26:07 25 presence of the jury. Because I view it, Keith, as I

13:26:10 1 understand your point, it's really a legal argument. We  
13:26:14 2 all are in agreement the underlying fact, perhaps even  
13:26:17 3 the photographs, are admissible. They're admissible to  
13:26:19 4 talk about what the scene looked like, how it changed,  
13:26:22 5 how it may have mitigated damages or not. And in that  
13:26:25 6 context we're all on the same page. Whether it also is  
13:26:28 7 appropriate for a spoliation argument, I'm not  
13:26:31 8 convinced. But we can address that at a later date I  
13:26:34 9 think more appropriately.

13:26:36 10 MR. WATKINS: Thank you.

13:26:37 11 THE COURT: Anything further? I believe --  
13:26:40 12 am I right, Ethan -- that takes care of the motion in  
13:26:43 13 limine motions pending before me. But you have  
13:26:45 14 something else?

13:26:46 15 MR. BAHRET: When we were off the record in  
13:26:47 16 chambers we discussed one other issue, and you did  
13:26:50 17 request something in writing, which we'll make sure you  
13:26:53 18 get. But for purposes of the record, I don't remember  
13:26:57 19 the names of the people involved, but Mr. Robon said he  
13:27:01 20 was going to bring somebody from Hospice and somebody  
13:27:04 21 from W.W. Knight to talk about flooding problems on  
13:27:08 22 their properties, which have nothing to do with  
13:27:12 23 Cambridge. And we would ask orally at this time, and  
13:27:15 24 subsequently in writing, an order in limine be issued  
13:27:20 25 prohibiting that testimony as being totally irrelevant,

13:27:24 1 unsupported by any sufficient foundation.

13:27:28 2 THE COURT: That's correct. We did discuss  
13:27:29 3 this briefly, and the Court is granting leave for  
13:27:33 4 defendant and plaintiff to briefly brief that issue.  
13:27:39 5 You don't need very many pages.

13:27:43 6 Is that testimony of record in the case by  
13:27:45 7 chance that I can look at it over the weekend?

13:27:48 8 MR. ROBON: It is not.

13:27:50 9 MR. BAHRET: It is not.

13:27:51 10 MR. ROBON: It is partially, Your Honor.  
13:27:53 11 It is in Cindy [sic] Soncrant's -- when I deposed the  
13:27:58 12 City engineer, she indicated they did cure some of the  
13:28:01 13 other flooding problems that they created.

13:28:03 14 THE COURT: But have these two people been  
13:28:05 15 deposed?

13:28:05 16 MR. ROBON: No.

13:28:06 17 MR. BAHRET: The two people involved have  
13:28:08 18 not been deposed.

13:28:09 19 And her name is Christy Soncrant, and she  
13:28:11 20 did not say that the City caused anything. What she  
13:28:14 21 said is that Hospice had complained that hey had some  
13:28:17 22 water problem, and since it cost no money at all, they  
13:28:22 23 dug a swale back there, and Hospice was happy with that.

13:28:25 24 THE COURT: As I understand, to crystallize  
13:28:28 25 the issue, there are two nearby property owners who had

13:28:31 1 trouble with flooding. The plaintiff wishes to offer  
13:28:34 2 their testimony as a reflection of the City's action to  
13:28:37 3 remedy the problem with those property owners, something  
13:28:40 4 plaintiff alleges the City has not done with this  
13:28:43 5 property. The defendant's position is there is no  
13:28:46 6 evidence that shows that the source of the flooding on  
13:28:53 7 those properties is the same reason as the flooding on  
13:28:56 8 this property?

13:28:58 9 MR. BAHRET: That's true as far as you go.  
13:29:00 10 And also if it was the same, it's irrelevant to this  
13:29:04 11 property. But yes, what you said is accurate.

13:29:06 12 THE COURT: And to the extent you folks want  
13:29:08 13 to brief that briefly, you have leave to do so. And I  
13:29:15 14 would like those no later than Sunday, which is the day  
13:29:27 15 before trial.

13:29:30 16 I should also indicate that there has been a  
13:29:35 17 joinder of the plaintiff in a motion of a now-dismissed  
13:29:38 18 defendant for a jury view. We've talked about that off  
13:29:41 19 the record. I sense no opposition and saw no  
13:29:44 20 opposition from the City of Toledo, formal or otherwise.  
13:29:47 21 And so a jury view has been approved by the Court. And  
13:29:51 22 I have worked with the parties on the logistics of that.  
13:29:53 23 And I believe we have that worked out so that the jury  
13:29:56 24 can have that view on Monday immediately after they're  
13:30:00 25 sworn in. So our plan is to have voir dire on Monday

13:30:04 1 afternoon, have a jury view. We'll start fresh on  
13:30:09 2 Tuesday morning at a time determined by the jury, begin  
13:30:12 3 with opening statements and proceed with evidence.

13:30:16 4 MR. BAHRET: For the record, Your Honor, we  
13:30:17 5 join in the jury view request. We did not file our own  
13:30:20 6 separate request because I didn't think the Court would  
13:30:23 7 want five or six different jury view requests because it  
13:30:27 8 would be redundant. Both parties are in agreement with  
13:30:30 9 a jury view. I'd like to commit to the record what we  
13:30:33 10 said off the record in there, and that is that nobody  
13:30:36 11 shall put any additional markings or stakes, painting,  
13:30:42 12 or in any way change the scene. And if it's already  
13:30:46 13 occurred, remove it. Also, nobody will make any  
13:30:49 14 statements to the jury other than the Court-appointed  
13:30:54 15 personnel when they go out on their jury view.

13:30:58 16 THE COURT: And I also ask that counsel work  
13:31:03 17 together and provide no later than Sunday a script that  
13:31:05 18 will be read to the jury while they're on the jury view.  
13:31:10 19 And I understand plaintiff's counsel has arranged for  
13:31:12 20 bus transportation. And I have concluded that defense  
13:31:16 21 counsel will travel separately to the site, which may be  
13:31:19 22 convenient for some to then go straight home or go to  
13:31:23 23 the office and work on the case, whatever their  
13:31:25 24 preference may be.

13:31:27 25 Marv?

13:31:28 1 MR. ROBON: My only comment, since Mr.  
13:31:29 2 Bahret joined in the jury view, I would request that he  
13:31:32 3 pay half of the bus cost.

13:31:36 4 MR. BAHRET: Is it too late to withdraw?

13:31:40 5 THE COURT: I think that's fair. We'll let  
13:31:42 6 the record reflect we'll tax the cost half and half.

13:31:46 7 Anything further from counsel for either  
13:31:48 8 side? I encourage you to continue to discuss. The  
13:31:52 9 record should reflect we had some settlement discussions  
13:31:54 10 prior to coming on the bench earlier today, that there's  
13:31:58 11 been a narrowing of the gap between the parties, and  
13:32:00 12 perhaps with your continued discussions you might narrow  
13:32:05 13 it even further. But I leave that ball in your court.  
13:32:08 14 If there's nothing further, we're adjourned.

15 (Concluded at 1:32 p.m.)

16 - - -

17

18 C E R T I F I C A T E

19

20 I certify that the foregoing is a correct transcript  
21 from the record of proceedings in the above-entitled  
22 matter.

23

24 /s Tracy L. Spore\_\_\_\_\_

25 Tracy L. Spore, RMR, CRR

\_\_\_\_\_ Date